No. 82-1066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Appellant,

v.

HARRY PTASYNSKI, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Wyoming

BRIEF *AMICUS CURIAE* OF THE STANDARD OIL COMPANY

JERRY N. GAUCHE
(*Counsel of Record*)
THE STANDARD OIL COMPANY
200 Midland Building
Cleveland, Ohio 44115
(216) 575-4634

TERRENCE G. PERRIS
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce
Building
Cleveland, Ohio 44115
(216) 687-8500

Counsel for Amicus Curiae
The Standard Oil Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1066

UNITED STATES OF AMERICA,
Appellant,

v.

HARRY PTASYNSKI, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Wyoming

---

BRIEF *AMICUS CURIAE* OF THE STANDARD OIL COMPANY

This brief in support of appellant is submitted with the written consent of counsel to all parties, copies of which have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is The Standard Oil Company, an Ohio corporation which with its subsidiaries is commonly referred to as "Sohio." Sohio owns more than 50 percent of the Prudhoe Bay oil field in Alaska as well as producing and exploratory leases in arctic areas encompassed by the exemption at issue.

Sohio has participated in the exploration for and production of oil in Alaska since 1970 and has for many years been involved in exploration and production in the lower-48 states. It has considerable experience with the peculiar problems associated with petroleum development in the harsh arctic environment. As operator of half the Prudhoe Bay field, Sohio is familiar with the economic, climatic, ecological, and regulatory burdens that confront petroleum

activity in this environment and that, in the aggregate, far exceed those experienced elsewhere in the United States. Sohio's experience in the American Arctic[1] is being further expanded as it undertakes the enormously expensive exploration and development of recently acquired offshore leases in the Beaufort Sea and Norton Sound.

The acquisition of these arctic leases at a cost of more than $400 million, together with the substantial amounts necessary to develop those leases, indicates Sohio's continuing commitment to development of petroleum reserves in Alaska and the offshore arctic. Sohio is concerned, however, that affirmance of the district court holding concerning unconstitutionality of the "Alaska exemption," coupled with reversal on the severability issue, will adversely affect the economics of exploration for and production of crude oil in the arctic regions of this country and reduce the potential for additional production from those promising areas.

During Congress' consideration of the Crude Oil Windfall Profit Tax,[2] Sohio and others testified to the extraordinary burdens experienced in the development of arctic reserves. Congress recognized that the addition of a significant tax burden on new oil from these regions would frustrate national energy policy by impeding exploration and production in areas estimated to contain one-third of the undiscovered domestic petroleum reserves.[3]

---

[1] For ease of reference this Brief will use the term "American Arctic" to refer collectively both to those areas of the United States that are north of the Arctic Circle and to those subarctic regions (*i.e.*, those areas immediately south of the Arctic Circle) that exhibit substantially the same climatic and environmental conditions. In the same vein, references to "arctic" will encompass such subarctic areas as well.

[2] Pub. L. No. 96-223, §§101-103, 94 Stat. 229-56 (1980).

[3] While Congress received testimony to this effect, recent studies suggest that as much as 50 percent of the undiscovered recoverable oil resources in the United States occur in the arctic. National Petroleum Council, U.S. Arctic Oil & Gas 20 (1981).

This brief is in support of the Government's position that the Crude Oil Windfall Profit Tax exemption for "exempt Alaskan Oil"[4] is compatible with the uniformity clause of the Constitution.[5] Sohio does not express an opinion regarding the issue of severability and takes no position with respect to those allegations of unconstitutionality of the windfall profit tax not before the Court. It is not Sohio's intent to burden the Court with a lengthy repetition of the arguments made in the Brief for the United States. Rather, Sohio seeks to expand the arguments made in support of the Alaska exemption from the perspective it has gained during more than 13 years of intensive exploration, development, and production activity in the North Slope area of Alaska to show that Congress was justified in concluding that new oil produced in this hostile frontier area should, in pursuit of national energy policy, be placed in a separate classification and accorded special treatment under the windfall profit tax.

---

[4] The exempt category is defined at 26 U.S.C. §4994(e). Although the statute refers to this exempt category as "exempt Alaskan oil," this label does not accurately describe the scope of the exemption. As can be noted from the statistics set forth at page 21 of the Brief for the United States, nearly 90 percent of Alaska-produced oil is subject to the windfall profit tax. Sohio has paid over $2 billion in windfall profit tax on its American Arctic production, only a small fraction of which is presently classified as "exempt Alaskan oil." Moreover, it is reasonably expected that much of the oil qualifying for the exemption will be produced not in Alaska but from outer-continental shelf areas beyond the state boundaries. Thus, despite the "Alaska" label, most Alaska oil is not exempt, and most exempt oil will likely not be produced in Alaska. As a result, the exemption cannot be said to reflect any congressional intent to confer a benefit on Alaska or Alaskan producers. Nevertheless, for ease of reference, this Brief will continue to refer to the exemption at issue as the "Alaska exemption" and to the exempt category as "exempt Alaskan oil."

[5] Article I, Section 8, clause 1 of the Constitution provides, in pertinent part, that "all Duties, Imposts and Excises shall be uniform throughout the United States."

SUMMARY OF ARGUMENT

Congress has broad latitude in selecting the subjects of taxation. While the Framers limited this congressional discretion to the adoption of "geographically uniform" excise taxes, they did not preclude Congress from addressing regional issues of legitimate concern nor from using geographic terms to describe permissible non-geographic distinctions. Because the Alaska exemption serves these permitted objectives, it does not violate the uniformity clause restriction on the discretion of Congress to select the subjects of its taxing power.

The windfall profit tax was the result of a congressional effort to balance the taxation of deregulation revenues on the one hand and the encouragement of additional production on the other. Congress determined that arctic exploration and production were confronted with distinctive burdens that created inherent economic disincentives to production in that region, despite its great potential reserves. As a result, Congress concluded that arctic production was likely to show a very substantial response to increased decontrol revenues. The exemption of certain oil produced in the American Arctic was thus a proper classification based on the legislative objective to encourage production of those categories of oil which Congress judged most likely to achieve a substantial increase in production in response to higher prices. Unless this legislative objective is itself constitutionally objectionable, the congressional judgment that the exempted oil is entitled to special tax treatment should not be second-guessed by the courts.

Reversal of the District Court in this case will not dilute the uniformity clause. Even if a rational basis standard of review is applied to test the legislative classification, the Court has demonstrated in the past that this standard is sufficient to safeguard important societal interests. Moreover, where geographic terms are used to fulfill a legitimate

legislative objective, the Court may conclude that the interests protected by the uniformity clause call for a somewhat more rigorous analysis requiring the challenged classification to have a fair and substantial relationship to the legislative objective. Even under the standard of fair and substantial relationship, however, the Alaska exemption passes muster and should be sustained.

ARGUMENT

I. The Uniformity Clause Is Sufficiently Flexible to Permit Congress to Address Regional Problems.

Congress is accorded broad latitude in selecting the subjects that it will tax. For example, in *Flint v. Stone Tracy Company*, 220 U.S. 107 (1910), a taxpayer challenge to the corporate income tax on the ground that it arbitrarily taxed business conducted in corporate form while exempting identical non-corporate enterprises was rejected because "[i]n levying excise taxes [Congress has] the most ample authority . . . to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another." *Id.* at 158. Similarly, some years earlier the Court had said that "it is not part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed." *Patton v. Brady,* 184 U.S. 608, 623 (1902).

Nevertheless, the Framers intended the uniformity clause to restrict this congressional discretion insofar as excise taxes are concerned. The Court has long interpreted this restriction to require "geographic uniformity" — *i.e.*, that "[t]he tax . . . operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594 (1884). One leading commentator has succinctly summarized this restriction as providing that Congress "may not discriminate . . . on the basis

of location" in selecting the subjects that shall be taxed. L. Tribe, *American Constitutional Law* 252 (1978). Thus, the uniformity clause restricts Congress' otherwise broad discretion to impose excise taxes by prohibiting it from distinguishing between subjects solely on the basis of where the subject is located.

The Court has plainly recognized that this restriction is not an inflexible rule that precludes Congress from describing the subject in geographic terms if this serves to focus the legislation on special circumstances that exist in a particular geographic region of the country. Thus, in construing the parallel uniformity provision in the bankruptcy clause,[6] the Court referred to "the flexibility inherent in the constitutional provision" and concluded that

> "The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country and to fashion legislation to resolve geographically isolated problems. The problem dealt with . . . may present significant variations in different parts of the country. We therefore agree . . . that the uniformity clause was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."

Regional Rail Reorganization Act Cases, 419 U.S. 102, 158-59 (1974) (internal quotations and citations omitted).

As is discussed below and as was described to Congress, exploration and production activity in the American Arctic is subject to substantial "geographically isolated problems" that could cause the windfall profit tax to have a

---

[6]Article I, Section 8, clause 4 of the Constitution provides that "[t]he Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

significant negative impact on future exploration and production in that region far beyond any similar impact likely to result in other regions of the country. The District Court, however, turned a deaf ear to all such considerations. In particular, it failed to consider congressional determinations of "significant variations in different parts of the country" as to the impact that the windfall profit tax would have on the level of petroleum production. As a result, it improperly applied the uniformity clause so rigidly as to handcuff Congress in its efforts to fashion a windfall profit tax consistent with the national objective of increased oil production.[7]

---

[7]It is argued that "Congress does not have the power to ignore the constitutional requirement of geographic uniformity in order to accommodate special circumstances purportedly existing in a limited geographic area." Motion of the State of Louisiana to Affirm at 14. The issue, of course, is not whether Congress may ignore the requirement of geographic uniformity, but whether that concept is sufficiently flexible to permit classifications based on geographically different circumstances. The Court is asked to retreat from its position in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), recognizing such flexibility in the concept of geographic uniformity. Such retrenchment, however, would be unwise since the flexibility that this Court contemplated is necessary to the fashioning of laws governing such a geographically diverse land as the United States of America.

Even when the Constitution was drafted, this was a large country, and it must be presumed that the Framers were mindful that Congress would confront "geographically isolated problems" and "significant variations in different parts of the country," and that they had no intention to "hobble Congress" in its efforts to fashion excise taxation around such circumstances. *Id*. at 159. The country has since expanded to encompass half a continent, which has caused a widening of regional differences. This reinforces the Court's wisdom in concluding that the uniformity requirement should not be construed as "forcing [Congress] into nationwide enactments to deal with conditions calling for remedy only in certain regions." *Id*. The Court has ample means to police the activities in this area to assure that this flexibility is not abused to frustrate the interests protected by the uniformity clause.

II. There Are Sufficient Differences Between Exempt Alaskan Oil And Non-exempt Oil to Support the Exemption.

Congress made its intent clear that the greatest burden under the windfall profit tax was to be placed on those categories of oil the production of which was least likely to increase substantially in response to the higher revenues generated from the decontrol of oil prices, while the smallest burden would be imposed on oil the production of which appeared most likely to show a substantial increase as a result of decontrol revenues. This consideration was prominent both in Congress' structuring of the various tiers and in the exemptions carved out from the tax. Thus, for example, the Senate Report explained that

> "In designing the tax, the committee attempted to reduce or eliminate the tax burden on those types of oil the production of which is likely to be relatively sensitive to changes in tax rates or prices. It tried to maintain a higher tax burden on types of oil whose production is likely to be less sensitive to price changes."

S. Rep. No. 96-394, 96th Cong., 1st Sess. 2 (1979). In the same vein, the Senate Report stated that "for categories of oil where the production response is likely to be the greatest, the windfall increases smaller, or production costs greater, the committee has given special tax treatment." *Id.* at 27.

The Ways and Means Committee Bill, as the House Report explained, reflected fundamentally the same approach:

> "The committee's windfall profit tax is carefully designed to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production is likely to be responsive to price. The lowest tax burden will be on newly discov-

> ered oil, incremental oil produced on properties using tertiary recovery techniques, and Alaskan oil."

H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 7 (1979). The House Report went on to state that "[t]he committee believes that a relatively heavy tax on tier one and tier two oil, along with the more lenient treatment of newly discovered Alaskan and tertiary oil, strikes the appropriate balance between revenue needs and production incentives." *Id.* at 14. In the final analysis, the same chord was struck by the Conference Committee, where the ultimate contours of the exemption were fashioned, when it stated that "[t]he exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H.R. Conf. Rep. No. 96-817, 96th Cong., 2d Sess. 103 (1980).

Thus, Congress classified domestic oil production not according to differences in the physical properties of the oil but rather according to the anticipated response of each category of production to enhanced revenues that decontrol would afford the producer. In so doing, Congress inevitably had to take account of the economic, geological, and environmental circumstances that created inherent incentives or disincentives to continued production of each type of oil. The hearings and reports of the congressional committees reveal that Congress received substantial evidence from which it could make a reasonable and intelligent assessment of these factors and from which it proceeded to define the various categories of oil and to assess the impact that increased producer revenues would have on each category.[8] Because of the extraordinary burdens that confront

[8]*See, e.g.*, Crude Oil Tax, *Hearings Before the United States Senate Committee on Finance on H.R. 3919*, 96th Cong., 1st Sess. 222-60, 362-95 (1979); S. Rep. No. 96-394, 96th Cong., 1st Sess. 37-52 (1979); H.R. Rep. No. 96-304, 96th Cong., 1st Sess. 7, 13-15, and 16-31 (1979).

production in the arctic regions, Congress concluded that oil production from those areas would be highly sensitive to enhanced decontrol revenues and that the objectives of the windfall profit tax would be best served by exempting such oil from the tax.

A. The Burdens Confronting Oil Production in the American Arctic Regions are Extraordinary.

In testimony before the Senate Finance Committee, John H. Lichtblau, a noted expert on petroleum economics, described Alaska arctic production as "the most costly frontier oil ever discovered in the United States." Crude Oil Tax, *Hearings Before the United States Senate Committee on Finance on H.R. 3919*, 96th Cong., 1st Sess. 306 (1979) (hereinafter "Senate Hearings"). The truth in that assertion is easily demonstrated by a brief review of some of the burdens that oil must carry. Although other frontier areas of the United States face some of the same difficulties experienced in exploring for and producing crude oil in the arctic, the exempted areas are unique in confronting the most extreme combination of logistic, climatic, environmental, and regulatory conditions.

1. Unique Logistics.

The Alaska North Slope and interior and the adjoining arctic continental shelf are extremely remote. Oil discovered in those regions is valuable only if it can be economically transported to the markets in the South. To reach those markets, North Slope production must be first transported 800 miles through the $9.3 billion Trans Alaska Pipeline System (TAPS) to the port of Valdez, Alaska, and then by tanker from Valdez 2000 miles to ports in California or 6500 miles through Panama to the Gulf Coast. No other domestic production is subject to the staggering transportation costs of Alaska North Slope crude oil. These costs, ranging from $8.00 to $10.50 per barrel, are more than ten

times the average cost of transporting lower-48 production to market.

Moreover, remoteness impacts not only the cost of transporting crude oil from the arctic, but also the cost of exploration, development, and production. Because few products are manufactured in Alaska, virtually every bolt, nut, and washer must be transported from the lower-48 states or abroad. The North Slope can be reached by truck only over the 360 mile "haul road," specially constructed to service the oil development at Prudhoe Bay, by airplane or helicopter or, during a four to six week period when the ice melts in the Bering Sea, by ocean-going barge, an 6,000 mile round trip from Seattle, Washington. Because of these long and hazardous supply lines, everything costs more. For example, when the annual operating cost of a lift truck was $60,000 in Cleveland, Ohio, it cost $250,000 per year to operate the same truck on the North Slope.

2. *Climatic Conditions*.

The climate in the American Arctic is like nothing experienced elsewhere in the United States. Winter lasts for eight months, with subfreezing temperatures predominating from October to May. Temperatures of -60°F are not uncommon, and the winter mean temperature is -20°F. During winter storms, the wind chill factor can fall below -100°F.

In such a hostile climate, costs escalate dramatically. Equipment must be kept running 24 hours a day to prevent freezing, protective outerwear impedes even the simplest of tasks such as writing notes or handling tools, and minor failures become life-threatening crises. Additional costs are incurred to maintain safety and employee morale in a work environment where the sun sets on November 18 not to rise again until the following January 24.

A major consequence of these extreme climatic conditions and the environmental constraints described below is that many traditional production techniques prove ineffective. Enormous expenditures have been required to design and develop new methods of production to suit these extraordinary circumstances. Sohio has spent huge sums in research and development for this purpose.

3. *Environmental Obligations.*

Like the climatic conditions, the arctic environment, both onshore and offshore, is unique in the United States. The onshore areas are primarily arctic tundra underlain by permanently frozen ground called permafrost. The fragile tundra vegetation insulates the permafrost preventing all but a very shallow layer from melting. If the tundra is disturbed, its insulating qualities may be destroyed causing the permafrost to thaw and the surface to subside. To prevent melting the permafrost, every road, building, pipeline, and platform rests on either thick insulating gravel pads or insulated pilings. Because of the permafrost problem, for example, TAPS runs above ground for slightly more than half its 800 mile length resting on 78,000 insulated supports.

Pack ice presents a special problem for offshore producers in arctic regions of the United States. Because conventional drilling platforms cannot withstand the pressure of pack ice, an entirely new technology has been developed to drill for and produce oil offshore in the arctic. Sohio is constructing a gravel island in 48 feet of Harrison Bay water off the north coast of Alaska which will stand 25 feet above sea level and 350 feet across. When completed at a cost of $70 million, Mukluk Island will be the site of exploratory drilling on a Beaufort Sea lease for which Sohio paid $227 million. There is, of course, no assurance that the exploratory drilling for which these sums have been expended will be successful.

4. Regulatory Constraints.

Exploration in the American Arctic is constrained by regulatory restrictions on the drilling season designed to protect plant and animal life. Onshore exploratory drilling is generally limited to approximately nine winter months when the tundra is frozen and has sufficient snow cover that supply vehicles and drilling rigs can be transported across ice roads without damage to the fragile tundra plant life. Offshore drilling is precluded during the months of late summer and early autumn when the Bowhead Whales, an endangered species, migrate through the Beaufort Sea. These seasonal restrictions, which apply only to drilling in the American Arctic, cause the periodic idling of huge capital investments and thereby substantially increase the cost of exploring for and producing arctic oil.

5. Capital Requirements.

The remoteness, adverse climate, and environmental constraints contribute to costs of exploration and development in the arctic that are dramatically higher than elsewhere in the United States. Costs per well in the arctic average more than ten times the cost of lower-48 wells.

A major reason underlying such enormous capital obligations is that, owing to its frontier character, the American Arctic has no infrastructure to support oil exploration and production activities. Thus, every supply and facility must be transported thousands of miles to the site. The development of the Prudhoe Bay field required construction of an arctic city complete with housing, medical and recreational facilities, water supply systems, sewage treatment plants, power plants, roads, docks, an air strip, and communications systems. With respect to other domestic production, of course, at least some—and usually all—such basic facilities are already available within reasonable distances and at substantially lower cost. In the arctic, how-

ever, producers must function essentially on a bring-your-own basis. Such was the case at Prudhoe Bay, and similar demands will be made of producers developing other fields in the American Arctic.

Because of these exceptionally high costs of arctic exploration and production, the risks and consequences of failure are multiplied; "success" carries a much narrower definition. Discoveries that would be hailed in the rest of the United States may simply be uneconomic in the arctic, where the estimated reserves of a moderate size field may not justify the high capital costs involved in bringing the oil to market. Thus, "success" in arctic proportions requires a much larger discovery than is required in more hospitable environs. Not surprisingly, as the economic threshold increases, there is a corresponding rise in the risk of an uneconomic discovery.

B. Congress Was Aware of the Potential and the Unique Burdens of Exploration and Development in the American Arctic.

Congress was fully informed of the obligations burdening arctic petroleum production. In addition, Congress was told that the United States Geological Service had estimated that nearly one-third of the undiscovered petroleum reserves in the United States lie in Alaska and the adjoining continental shelf, most of it north of the Arctic Circle. *Senate Hearings*, 235 (statement of Alton W. Whitehouse), 256 (statement of W. F. Kieschnick). Thus, it was made clear that the American Arctic was distinctive not only for the burdens it imposed on oil producers but also for its great, but unrealized, potential to contribute to the solution of the country's energy shortage.

The economic burden of arctic production was graphically illustrated to Congress by the Prudhoe Bay experience. After years of fruitless exploration—and countless

dry holes—on the North Slope, the effort was finally rewarded with the discovery of the large Prudhoe Bay oil field. Even then, however, the participants were required to spend nearly $4 billion to bring the field into production and over $9 billion to construct a pipeline to transport the oil. Moreover, Congress was informed that the participants will spend between $12 billion and $15 billion more just to maintain the field's production. *Id.* at 233, 254, 258.

There was thus ample basis for the statement during the Senate debate that

> "It is generally agreed that there is a greater degree of risk in exploration and development in frontier areas, such as the Alaska North Slope, than there is in the traditional Lower 48 oil exploration. Major factors contributing to these increased risks are severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure."

125 Cong. Rec. S16,327 (daily ed. Nov. 8, 1979). In classifying oil production for purposes of the windfall profit tax principally on the basis of the perceived ability of production to respond to enhanced producer revenues, it was both proper and necessary for Congress to base that determination, at least in substantial part, on the economic burdens that already served to inhibit production of discovered reserves. This was especially appropriate with respect to the arctic, which, as previously noted, Congress had been advised contained an estimated one-third of the potential undiscovered reserves in the country. The economic burdens depressing production levels would inevitably be counteracted by the increased revenues from decontrol. Formations that would otherwise be uneconomic would become producible. In short, the windfall profit tax would function as intended, in harmony with national energy policy.

C. The "Alaska Exemption" is Based Not on Locational Considerations, But on Differences That are Central to the Objectives of the Windfall Profit Tax.

Having declared its intent to classify oil, and to vary the tax burden among the classes, according to the anticipated ability of the production of each category to respond positively to enhanced decontrol revenues, Congress exempted certain types of arctic oil consistently with that legislative objective. In short, this oil and certain other categories of exempt oil were distinguished from non-exempt oil for the same reason that tier one oil was perceived to be different from other tiers of oil — the anticipated response to decontrol.[9] Since the "exempt

---

[9] See authorities cited at note 8. The point was made during the Senate debate in the following terms:

> "The test for exemptions found in the bill to date is a very simple test and it has to do with production effects of the exemptions. That is to say, that over and over again it was argued in the Finance Committee and on the floor of the Senate that this exemption or that exemption is justified because it relates to national energy policy, that, if the Federal Government foregoes revenues by the exemption route on certain types of oil, those exemptions will be justified by production effect on types of oil that are thought to be sensitive to the taxation on its production."

125 Cong. Rec. S18,651 (daily ed. Dec. 15, 1979). It was also stated that, in the absence of an exemption for arctic oil, "as much as 3 billion barrels of reserves may remain in the ground because at the lower price they will be uneconomic." 125 Cong. Rec. S16,327 (daily ed. Nov. 8, 1979). The Alaska exemption was also described by the Joint Committee on Taxation as "intended, in part, to eliminate the possibility of creating a disincentive for the production of Alaskan oil." Joint Committee on Taxation, "The Design of a Windfall Profit Tax," 96th Cong., 1st Sess. 21 (1979). See also 125 Cong. Rec. S16,845-46, S16,864 (daily ed. Nov. 16, 1979), S17,268-85 (daily ed. Nov. 27, 1979), and S17,496 (daily ed. Nov. 29, 1979), 126 Cong. Rec. H1841 (daily ed. Mar. 13, 1980) and S2629 (daily ed. Mar. 19, 1980), for further discussion of the policy considerations underlying the various exemptions and the structuring of the various tiers.

Alaskan oil" classification is based on the same standard that underlies the other classifications established in the windfall profit tax, the challenged classification is obviously neither an overt nor a disguised locational discrimination.

Presumably, such a basis for classification does not in itself give rise to a constitutional infirmity, and the appellees do not appear to contend otherwise. Congress simply chose to ration the economic benefits of decontrol according to its perception of how much additional domestic oil production the public will derive in return for the higher price it pays. But for the fact that Congress found this geographically neutral standard to be satisfied by production within a particular geographic region of the country, one would expect that there would be no basis for invalidating the legislative classification. The critical questions, therefore, are 1) whether the uniformity clause precludes *per se* any finding that the standard applied by Congress was satisfied by all production in a given region, and 2) if Congress is free to make such a finding, whether it has sufficient basis in fact to satisfy uniformity clause requirements.

This Court has already rejected the proposition that the uniformity clause precludes Congress in all cases from determining that a set of legislatively dispositive conditions persists in a given region and not in others. *Head Money Cases, supra; Regional Rail Reorganization Act Cases, supra; Nicol v. Ames*, 173 U.S. 509 (1899). In the *Head Money Cases*, one of the seminal decisions on the meaning of the uniformity clause, the Court showed no hesitation in approving an excise tax over a uniformity clause challenge, even though the tax by its essential terms was applicable only to the coastal states and not to the inland states:

> "[T]he evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the

> aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. Here there is substantial uniformity within the meaning and purpose of the Constitution."

112 U.S. at 595 (citations omitted). The Court displayed the same practical approach in the earlier case of *Nicol v. Ames*:

> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect."

173 U.S. at 521 (citations omitted). By the same token, the Court explicitly acknowledged in the *Regional Rail Reorganization Act Cases* the propriety of Congress' recognizing "differences that exist between different parts of the country" and "geographically isolated problems." 419 U.S. at 159. Thus, there is no room for any assertion that the uniformity clause absolutely precludes Congress from focusing excise tax legislation in geographic terms.[10]

Since the Court has held that the uniformity clause permits Congress to consider geographic differences, the issue remains whether the "differences" asserted in support of the geographically described classification have sufficient

---

[10]Contrary to the assertions by the appellees, this Court's decision in *Railway Labor Executives Association v. Gibbons*, 455 U.S. 457 (1982), did not reduce the practical flexibility that the Court has traditionally accorded to the uniformity clause. That case addressed a statute enacted for the benefit of a single bankrupt railroad. In expressly reaffirming its holding in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court distinguished the statute before it on the ground that it was "not a response . . . to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad." 455 U.S. at 470 (emphasis in original).

basis in fact. In this instance the foundation for the congressional determination is so firmly established both in the legislative record and as a matter of acknowledged fact that, whatever standard of review the Court applies, there is ample justification for the classification and it should be sustained. The appellees are essentially left to quibble that the classification should have been somewhat broader here or there to encompass perhaps other areas where the economic conditions show some similarities to the American Arctic.[11] Such vague similarities, however, provide scant basis for attacking a legislative classification. It cannot be said that any other domestic areas with significant potential oil reserves were shown, or could have been shown, to Congress to involve the unique combination of burdens that, in the aggregate, even approach those encountered in the areas encompassed by the Alaska exemption.

As a matter of policy, it might be argued that certain production outside this exempt category could also respond affirmatively to enhanced decontrol revenues even though the inherent burdens faced do not rise to the level of those experienced in the American Arctic. However, these are matters of degree most appropriately left to the legislature.

---

[11]For example, it has been noted that Congress could have expressed the classification in terms that would have encompassed roughly the same geographic region but perhaps included limited other areas of the United States. Motion of Taxpayer and Association Appellees to Affirm at 10. While Sohio agrees that Congress was free to adopt such an approach in its effort to prevent the windfall profit tax from becoming a disincentive to increased production, the essential issue is whether Congress was *required* to take such a tack in preference to the course it selected. Consistently with the legislative prerogative to "take one step at a time," it is inappropriate to fault Congress for addressing a specific set of circumstances that were shown to exist, solely because it did not also deal with hypothetical circumstances that might or might not exist elsewhere. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

Congress devoted months of study to the question of production response to the windfall profit tax; and, since the courts are not as well equipped as the legislature to undertake this sort of factual analysis, they have traditionally and appropriately been reluctant to substitute their judgment on such matters for that of Congress. The Court has long acknowledged that the legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [It] may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (citations omitted).

This analysis is not altered by Congress' use of geographic terms to describe the exemption. The uniformity clause is not an iron rule of draftsmanship that prevents Congress from articulating its intentions in geographic terminology if this is the most convenient means to express a classification that is rooted in proper policy considerations. As Judge Friendly has said in this connection:

> "Since what Congress did was not in violation of the Constitution, we decline to hold its action to have constituted a breach of the uniformity clause simply because it used words readily intelligible to its members and the public rather than circumlocutions that would have had exactly the same effect."

In re Penn Central Transportation Company, 384 F. Supp. 895, 916 (Regional Rail Reorg. Ct. 1974). The uniformity clause does not require Congress to engage in verbal gymnastics to attain an otherwise legitimate legislative objective.

As Congress realized, there is tension between the dual objectives of the windfall profit tax—the taxation of decontrol revenues and the stimulation of domestic oil production. The congressional distinction among the three tiers of oil and between exempt and non-exempt oil

represents its determination of the most effective means of maximizing both objectives. Since the classification at issue was based on differences that are central to these legislative objectives and not on any desire to convey a benefit to any region or location, the classification is within the flexibility that the Court has acknowledged in the uniformity clause. While the particular problem addressed may have a geographic concentration, the classification is geographic only in terms of nomenclature; in other respects it is no more geographic than that which this Court sustained in the *Head Money Cases* and in the *Regional Rail Reorganization Act Cases*. The uniformity clause does not require that Congress choose between taxing decontrol revenues and encouraging optimal domestic petroleum production. It may, as it has done here, address both objectives in a forthright manner without running afoul of the uniformity clause.

III. The Alaska Exemption Can Be Sustained Without Diluting the Uniformity Clause.

Sustaining the Alaska exemption need not convert the uniformity clause into an equal protection clause for taxpayers. As a general matter, the Court has held that equal protection permits all but the most arbitrary classifications in taxation matters. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974). The uniformity clause, however, is much more specialized in scope and substantially restricts congressional discretion when it comes to excise tax classifications based on location. Indeed, the Court might well conclude that the uniformity clause prohibits such classifications altogether. Nevertheless, a critical first step in the analysis of any classification under the uniformity clause is to determine whether the classification is in fact location-based. As the Court's decision in the *Regional Rail Reorganization Act Cases*, *supra*, indicates, this determination cannot be made

solely from the formal language of the statute. The courts must look behind geographic terminology to determine whether the classification is based on differences other than location.

It is not enough to begin and end the analysis, as the District Court did, with the proposition that the uniformity clause requires that "the tax . . . operates with the same force and effect in every place where the subject of it is found"; it remains necessary to define the subject of the tax in order to apply this proposition. The Court must determine whether Congress legitimately found geographically isolated problems or conditions from which it could conclude that the subject taxed was different from subjects not taxed. In making this determination the Court may find it appropriate to apply special scrutiny to excise tax classifications that are cast in geographic terms in order to guard against wholesale incursions on the interests protected by the uniformity clause.

If the Court were to decide that the appropriate standard of review is a rational basis test, then it could perhaps be said that this step of the uniformity clause analysis would be no more restrictive than the minimal equal protection scrutiny accorded tax classifications. However, that is not inevitable. The Court has demonstrated, for example, that, even under a rational basis analysis, there are some interests that may justify the Court's special attention and thus a more critical review. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). Moreover, the Court could also determine that this issue requires it to balance the traditionally broad power of classification accorded the legislature in taxation matters against the important interests safeguarded by the uniformity clause to arrive at a somewhat more rigorous standard of review requiring the courts to determine whether the classification has a "fair and substantial" relationship to nonlocational objectives of the taxing legislation. See, e.g.,

State v. Erickson, 574 P.2d 1, 11-12 (Alaska S. Ct. 1978). This would require the courts first to assess whether the legislation indeed had a nonlocational objective and second to judge whether the challenged classification bore a fair and substantial relationship to that objective. Such a standard of review would give full measure to the interests protected by the uniformity clause while at the same time retaining the flexibility that the Court has previously said must inhere in that provision to allow Congress to deal with regional problems.

Whichever standard of review is applied in this case, the unique burdens that Congress found to encumber production in the American Arctic would appear to afford an ample basis from which it could properly conclude that such production constituted a subject of taxation separate and distinct from production not so burdened. For that reason, the Court can sustain the Alaska exemption without concern that it is thereby granting *carte blanche* for all manner of locational discriminations in excise taxes.

CONCLUSION

The judgment of the United States District Court for the District of Wyoming should be reversed on the ground that the exemption prescribed in 26 U.S.C. §§4991(b) and 4994(e) is not inconsistent with the uniformity clause of Article I, Section 8, clause 1 of the Constitution.

Respectfully submitted,

JERRY N. GAUCHE
(*Counsel of Record*)
THE STANDARD OIL COMPANY
200 Midland Building
Cleveland, Ohio 44115
(216) 575-4634

TERRENCE G. PERRIS
SQUIRE, SANDERS & DEMPSEY
1800 Union Commerce
Building
Cleveland, Ohio 44115
(216) 687-8500

Counsel for Amicus Curiae
The Standard Oil Company

March 1983